Tropiland Sdn Bhd v DCB Bank Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-751 OF 1997

NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA

19 FEBRUARY 2000

Civil Procedure *— Stay of execution — Application for stay of writ of possession pending disposal of appeal — Appeal based on merits — Business reputation would be in jeopardy — Whether special circumstances — Whether appeal would be rendered nugatory*

The applicant who operated a multi-storey car park obtained an overdraft of RM8.5m from the first respondent that was secured by a debenture. When the applicant was informed that the second and third respondents were appointed as receivers and managers under the debenture, the applicant applied for an injunction against the second and third respondents. The parties however reached an understanding and entered a consent order. The second and third respondents subsequently obtained a writ of possession against the applicant in the High Court. The applicant sought to obtain a stay in the High Court but was refused. The applicant then filed this application for a stay of the High Court's writ of possession pending the disposal of the applicant's appeal and contended that their application had merits as the High Court's order was contrary to the consent order that was entered and that the respondents had not complied with O 45 r 3(3) of the Rules of the High Court 1980 with regard to the issuing of the notice to the applicant. The applicant further contended that in the event that the stay was not granted, the appeal would be rendered nugatory and that the applicant's business reputation would be in jeopardy.

Held, dismissing the application with costs:

(1) No irreparable harm would befall the applicant if the stay was refused as rentals would still eventually go to the applicant via the receivers and managers, less what the appellant owed to the respondents. The applicant also had not shown any special circumstances for a stay to be ordered. As such, the application for the stay was refused (see pp 68H–69A); *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 followed.

(2) Any loss suffered by the applicant could be easily quantified. In the event that the respondents were to lose in the appeal, then the applicant could recover from the respondents what they have lost as damages were quantifiable and therefore recoverable. As such, the court failed to see how the applicant's appeal would be rendered nugatory if they were to succeed in its appeal (see p 69B–C).

[Bahasa Malaysia summary

Pemohon yang menjalankan operasi tempat letak kereta bertingkat mendapat satu overdraf sebanyak RM8.5 juta daripada responden pertama yang telah dijamin dengan debentur. Apabila pemohon diberitahu bahawa responden-responden kedua dan ketiga telah dilantik sebagai penerima dan pengurus di bawah debentur tersebut, pemohon telah memohon satu injunksi terhadap responden-responden kedua dan ketiga. Pihak-pihak berkenaan walau bagaimana pun telah mencapai satu persefahaman dan memasuki satu perintah kebenaran. Responden-responden kedua dan ketiga kemudiannya memperoleh satu writ pemilikan terhadap permohonan tersebut di Mahkamah Tinggi. Pemohon telah memohon untuk memperoleh satu penggantungan di Mahkamah Tinggi tetapi telah ditolak. Pemohon kemudiannya telah memfailkan permohonan ini untuk satu penggantungan terhadap writ pemilikan Mahkamah Tinggi sementara menunggu penyelesaian rayuan pemohon dan menegaskan bahawa permohonan mereka mempunyai merit-merit kerana perintah Mahkamah Tinggi adalah bertentangan dengan perintah kebenaran yang telah dimasuki dan bahawa responden-responden tidak memenuhi A 45 k 3(3) Kaedah-Kaedah Mahkamah Tinggi 1980 berhubung dengan pengeluaran notis tersebut kepada pemohon. Pemohon seterusnya menegaskan bahawa di dalam keadaan di mana penggantungan tersebut tidak diberikan, rayuan tersebut akan dianggap tidak berguna dan bahawa reputasi perniagaan pemohon akan terjejas.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Tiada kemudaratan yang tidak boleh diperbaiki akan menimpa pemohon jika penggantungan tersebut ditolak kerana duit sewa akan masih lambat-laun diperolehi oleh pemohon sebagai penerima dan pengurus, kurang daripada apa yang pemohon terhutang kepada responden. Pemohon juga tidak menunjukkan apa-apa keadaan istimewa agar satu penggantungan diperintahkan (lihat ms 68H–69A); *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 diikut.

(2) Apa-apa kerugian yang dialami oleh pemohon boleh dinyatakan kuantitinya dengan mudah. Di dalam keadaan di mana responden-responden gagal di dalam rayuan, maka pemohon boleh mendapat semula daripada responden-responden apa yang mereka hilang kerana ganti rugi tersebut boleh dinyatakan kuantitinya. Oleh demikian, mahkamah telah gagal untuk melihat bagaimana rayuan pemohon akan dianggap tidak berguna jika mereka berjaya di dalam rayuan mereka (lihat ms 69B–C).]

Notes

For cases on stay of proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4272–4332.

Cases referred to

Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (folld)

Legislation referred to

Rules of the High Court 1980 O 45 r 3(1), (2), (3)

Appeal from: Civil Suit No 22–183 of 1997 (High Court, Pulau Pinang)

Thayalan s/o Muniandy (*Thayalan & Assoc*) for the applicant.

Wong Kian Kheong and *DP Naban* (*Lee Hishammuddin*) for the first respondent.

Foo Say Keow (*Murad & Foo*) for the second and third respondents.

Abu Mansor JCA (delivering judgment of the court): On 23 February 1998, after hearing full arguments we refused the applicant's/plaintiff's application for a stay of the learned judge's order dated 9 June 1997 granting leave to issue a writ of possession to the second respondent and third respondent.

The facts of this case are as follows. The plaintiff operated a business of 'multi-storey car park'. To enable them to carry on that business the plaintiff on 13 August 1984 obtained an overdraft from the first respondent bank in the sum of RM8.5m. In return for the said overdraft the plaintiff executed with the first respondent a debenture dated 23 October 1991.

On 2 June 1997, the plaintiff was informed by letter that the second respondent and third respondent had been appointed receivers and managers of the plaintiff under the said debenture.

On 3 June 1997, the plaintiff filed a writ and took out a summons in chambers against the respondents praying for an interlocutory injunction with a view to preventing the second respondent and third respondent from acting as receivers and managers of the plaintiff and entering the plaintiff's premises until otherwise ordered.

Meanwhile on 9 June 1997, the parties reached an understanding and entered a consent order. On 8 August 1997, the second and third respondents applied for a writ of possession against the plaintiff and the application was allowed by the judicial commissioner on 25 November 1997. Against this decision the plaintiff filed an appeal to the Court of Appeal. On 27 November 1997 the plaintiff applied to the High Court for a stay of the 25 November 1997 order but a stay was refused by the High Court.

The plaintiff then applied, by way of a notice of motion, in the Court of Appeal, praying for a stay of High Court's order until the disposal of the plaintiff's appeal. The plaintiff then filed a certificate of urgency as the bailiff of the Penang High Court had issued a notice to vacate to the plaintiff praying that the plaintiff give vacant possession of the said premises on or before 30 January 1998.

Mr Thayalan, the plaintiff's counsel commenced his submission by referring us to the High Court's order of 25 November 1997 giving the respondent liberty to issue a writ of possession. He submitted that the High Court's order of 25 November 1997 was contrary to the terms of the consent order of 9 June 1997. He referred us to para (c) of the order which states:

> (c) ... that in the event the plaintiff shall be in default of its obligations as above mentioned the second and third defendants shall immediately be entitled to enter into possession of the said building and exercise all their powers and carry out all duties pursuant to the said debenture.

It was the contention of the plaintiff that the correct interpretation of that cl (c) is that it is a mere declaration of the entitlement of the second and third defendants to enter and in no way can it be regarded as an order which immediately entitled the second and third defendants to possession. Counsel further contended that before the respondent can have possession there must be a breach and they must have an order of possession in accordance with O 45 r 3(1), (2) of the Rules of the High Court 1980 which provides:

> (1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say —
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> (a) writ of possession;
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> (b) in a case in which r 5 applies, an order of committal.
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> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which O 83 applies.

Counsel contended that the respondents had not duly complied with the requirement of O 45 r 3(3) where the plaintiff/occupier is to have due notice of the proceeding requiring the court's leave. Counsel for the plaintiff, therefore, asked for a stay of the 25 November 1997 order because the plaintiff's application has merits.

The plaintiff's counsel further submitted that in the event stay is not granted, the appeal will be nugatory. It was important to mention, he said, that the business of the plaintiff is that of a computerized multi-storey car park where the plaintiff is charged with maintaining the whole building and with several tenants. The plaintiff also had a reputation to protect, failing which such tenant and landlord relationship enjoyed so far could be in jeopardy if the writ of possession is not stayed.

We were of the view there was only one issue that falls for decision. It was as to whether a stay ought to be granted in the circumstances of this case.

It was plain to us that if a stay was refused no irreparable harm would befall the plaintiff. The easily quantifiable rentals would still eventually go to the applicant via the receivers and managers, less of course of what the appellant owe the respondents. In that way no prejudice is caused to the plaintiff if stay is not granted by us.

A We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.

B In coming to our decision, we agreed with counsel for the first respondent that any loss suffered by the plaintiff can be easily quantified. In the event that the respondents were to lose in the appeal then the plaintiff could recover from the respondents what they have lost as damages are quantifiable and therefore recoverable. We fail to see how the plaintiff's

C appeal would be rendered nugatory if it were to succeed in its appeal.

For the above reasons, we dismissed the plaintiff's application for a stay as we held that merit alone is no special circumstances. The plaintiff's application was dismissed with costs.

Application dismissed with costs.

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Reported by Chin En Tek

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